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and whether it has been negotiated or not, does not appear. If the attachment could reach the bill now in the hands of Sayre, it is not seen why it might not reach the other bill; so that it would not be just to Sayre, to put the whole burden on him. Yet, until it does appear that the bill was not negotiated, no decree for the money can be made against the Rail Road Company:

Wherefore it is decreed that the petition be dismissed, but without prejudice to any other suit against Field & Jones, and that the complainants pay the Rail Road Company and said Sayre, their respective costs herein expended.¹

Speed & Worthington, for the plaintiff.

Bland Ballard, for Sayre.

Court of Oyer and Terminer, Philadelphia County.

COMMONWEALTH VS. ARTHUR SPRING.

Where a person not returned on the *venire* answers for a juror who was returned, and goes into the jury box and hears a capital case, and renders a verdict, assuming to be the juror actually summoned, a new trial will be granted.

Defendant was convicted of the murder of Ellen Lynch, and on

¹ In Kentucky, attachments against the effects of non-resident debtors, are issued out of the Court of Chancery, which has also all the equity jurisdiction of the High Court of Chancery in England. This decision of the Chancellor was taken to the Court of Appeals, and affirmed on the 28th January, 1853.

The same point as that involved in the principal case, was decided by the Supreme Court of Pennsylvania, in *Keiffer vs. Ehler*, 18 Penn. St. R. (6 Harris) 388, where it was held that an attachment-execution is unavailing against a *bona fide* holder of negotiable paper, who obtains it after attachment, before maturity, and without notice. It was observed, however, by his Honor, Judge Lowrie, in delivering the opinion of the Court—"That the negotiation of such paper by a defendant, after he has had notice of the attachment, is a fraud on the law, and we think that the Court from which the attachment issues, has power to prevent this, by requiring the instrument to be placed in such custody, as will prevent it from being misapplied, taking care that it shall be demanded at maturity, and that proper notice be given to the endorsers, if necessary, and that the money, if paid, shall stand in place of the note or bill to abide the event," page 391.

Saturday, March 26th, by Mr. *Doran*, his counsel, moved for a new trial, and filed the following reasons :

1st. The trial was irregular, and the empannelling of the jury irregular and contrary to law, inasmuch as Charles McQuillan, who acted as a juror in the case, had never been drawn, summoned and returned as such, but answered to the name of one Bernard Corr, and as such was sworn and empannelled as a juror, a fact unknown to the prisoner or his counsel until after the verdict.

2d. The verdict cannot be sustained, because Bernard Corr, who was supposed to be one of the jury, did not act as such and unite in the verdict.

April 2, 1853.—The opinion of the Court was delivered by THOMPSON, P. J.—The verdict, which was the result of a protracted and patient investigation of this extraordinary case, seemed so clearly indicated by the evidence, that it met an approving response in the bosoms of all who had watched the progress of the trial. It was, however, scarcely rendered, when the Court and community were surprised to learn that an occurrence had taken place upon the trial, upon which the prisoner could found an application for a new trial.

This application was made upon the ground that a person not summoned as such, had assumed the name and acted in the place of one of the regular jurors.

That any man claiming to be a citizen of this enlightened Republic, could be so stupid or so reckless as to thrust himself uncalled into the jury box, and there assume to decide upon the fate of a fellow being whose life was in peril, seems almost incredible. The fact, however, is undenied, that Charles McQuillan, an entire stranger, undertook to answer to the name of Bernard Corr, a juror regularly summoned. When Bernard Corr was called upon the jury in this case, Charles McQuillan answered, was sworn as a juror, sat upon the trial, and joined in the verdict, without the Court being apprised of the error, and, as is alleged, without the knowledge of the prisoner.

This is the sole ground presented for the motion for a new trial.

In approaching the investigation of the principles involved in

this motion, the Court has not been unaffected by the gravity of the question presented, and the extraordinary character of the case in which it has arisen. We, like our fellow men, cannot be insensible to the appalling atrocity of the crimes charged against the prisoner. We cannot fail to observe the operation of that natural horror of crime which has caused excited crowds to watch with intense anxiety the result of this trial, nor are we forgetful of the crushing weight of that evidence under which the counsel for the prisoner, in his argument upon this motion, admitted that his client must again necessarily be convicted. But these are matters against which we must close our minds in considering the question before us—for were Arthur Spring ten times the guilty wretch that the public voice proclaims him, we, as the sworn ministers of the law, are bound to secure to him an impartial trial by a jury of his country. The only question for us to consider is, has he had such a trial?

The law has carefully provided for the selection and qualification of Jurors; it has thrown around the jury box all those guards which seem calculated to ensure its purity, and it gives to every one charged with crime the right of trial by a jury composed of twelve of his peers, selected in the manner specially directed. Unless the requisition of the law, which provides for the selection, the summoning and empannelling of the jury be strictly complied with, the prisoner has the right to take advantages of the irregularity. For his protection the law has given to him the right to challenge, which he may exercise either to the array or to the polls. It supplies him with the names of the jurors who are to be summoned in his case, with such description of their pursuits and residences as will fully enable him to judge of them, and to protect his rights by rejecting any he deems obnoxious to him.

With these safeguards thrown around him, a citizen is protected from the influence of malice or design, and he is entitled to ask the Courts by whom the law is administered, to afford the fullest protection to his rights. This protection the Court is always ready to afford, but in doing so require the party himself to be watchful in the care of his own interests. If before or during trial he omits or neglects to challenge for a defect or irregularity which he might

thus have taken advantage of, he cannot, after verdict, claim the benefit of it.

The present case, however, is one in which the right to challenge could not have protected the prisoner. The list of jurors summoned contained no such name as Charles McQuillan. He presented himself unsummoned, assuming the name of a regular juror. His person was unknown to the prisoner. He could not know that the juror upon whom he was required to look, was not Bernard Corr, whose name this stranger had falsely assumed. His refusal to challenge him was a selection of Bernard Corr as one of his panel, not an assent that McQuillan should be sworn. They were both equally strangers to him, and his reliance upon the proper jury list placed before him, for the true description of those who appeared in answer to the names called, must not operate to his prejudice.

He had undoubtedly the right to be tried by twelve jurors regularly summoned. He has not been so tried. That he has not waived any right is conceded; and yet he has been deprived of it. It is not denied on the part of the prisoner, that if the defect in the proceeding had been the subject of challenge, and not taken advantage of by him in proper time, he would now be barred by the Act of 21st February, 1814, having gone to trial. The provisions of that Act are applicable to criminal cases, (*Com. vs. Dyott*, 5 Wharton, 78,) and have, in a civil cause, been extended to a case within the spirit, though not within the letter of the law. *Burton vs. Erlich*, 3 Harris, 236. The circumstances of the latter case are somewhat similar to those of the present, but the fact, that in that case the name of the party called as the juror, was different from that of the person returned on the *venire*, was notice to the parties, and enabled either of them to have had the juror's name struck from the panel before going to trial, which they omitted to do. This decision does not therefore aid us, nor if the facts were even more similar would we be willing, in a case of the highest penal character, to depend upon the authority of a civil case, to meet the exigencies of which it was necessary to resort to the spirit of the law, though confessedly beyond its letter. Neither the Act of Assembly, nor the case cited, seem to meet the difficulty now

presented. That it was not a trial by a jury regularly summoned, is clear; and it is equally clear that the illegality has not been waived by the prisoner. There has, therefore, been a mistrial, and a verdict rendered by only eleven jurors. The important question then presented is, whether after verdict, the prisoner can take advantage of this irregularity?

The current of the English authorities in this question is not uniform, but the prevailing opinion seems to be, that where such an irregularity is noticed before the verdict is rendered, the party objecting will be entitled to a new trial; but if not discovered until after the verdict, it is too late to take advantage of it. It then becomes a question for the discretion of the Court to grant or refuse a new trial, if they believe injustice has been done in the case.

If we could find that the rule has been fully established, to leave it to the discretion of the Court to decide the question of a new trial, upon the opinion entertained as to the justice of the case, the present motion would be one of easy decision, as it has not been suggested, even in argument, that any other verdict could or ought to have been found under the evidence given. We have examined this point with an anxious desire to sustain this verdict, if it could be done without depriving the prisoner of his legal right, but unwilling, in a case of such magnitude, to rely upon any but well settled principles.

In the early case of *Norman vs. Beaumont*, Willes, 484, where the facts were precisely similar to those of the present case, a person not returned on the jury having answered for a jurymen who was returned, and the fact having been proved by affidavit, it was the unanimous opinion of the Court that the verdict should be set aside. The note of a case in March's New Cases, p. 132, appears to be a contrary decision, though the facts are not fully stated.

The case of *Hill vs. Yeates*, 12 East, 229, decided in 1810, is generally referred to as the ruling decision on this subject. There the son of a jurymen had answered to his father's name and served upon the jury. On a motion to set aside the verdict, the case of *Norman vs. Beaumont* was referred to, but Lord Ellenborough

said, that he had mentioned the case to all the Judges, they were of opinion that it was within their discretion to grant or refuse a new trial on such ground, and that if no injustice had been done, which was not pretended, they would not interfere, but leave the party to get rid of the verdict as he might.

The case of *Hill vs. Yeates*, is certainly fully in point, but an examination of more recent cases shows that it has not always been followed so as to have laid the foundation of an established rule.

In *Dovey vs. Hobson*, 6 Taunt. 400, the mistake was discovered before verdict, and it was held that a *venire de novo* ought to be granted for the mistrial, though the case of *Hill vs. Yeates* was recognized as authority, in a case where the objection was after the verdict.

A new trial was refused in *The Queen vs. Sullivan*, 8 Adol. & Ellis, 831, because the defendants had the opportunity to challenge and waived it.

In *King vs. Tremearne*, 5 B. & Cress. 254, one J. Williams was on the jury panel, but did not appear, and his son, R. H. Williams, answered and was sworn: he was under age, and had not the property qualification. The indictment was for perjury, and Abbott, C. J., in granting a new trial, seems to rely upon the impossibility of a challenge by the defendant at the trial. In referring to *Hill vs. Yeates*, he says: "I am quite aware of the difficulty pointed out by Lord Ellenborough, viz.: that yielding to such an objection lays open a door to practice and collusion. It is necessary to guard against them as well as we can, but I think we should not be justified by an apprehension of mischief which may hereafter arise, in saying that a verdict should be binding where a person without practice of either party has appeared and served on the jury, not having the requisite qualifications either of age or estate." Bayley, J., says, "It is a mistrial; because none should serve save those in the panel." The other judges also put it on the ground "that no challenge could be taken."

This case, though the proper qualifications were wanting in the person improperly sworn on the jury, which fact distinguishes it, to some extent, from *Hill vs. Yeates*, was decided chiefly on the

ground that a challenge could not have been taken, and certainly shakes the authority of that case.

In *The King vs. Sutton*, 8 Barn. & Cress. 417, where the objection to the juror was alienage, the refusal of the new trial was on the ground that the right of challenge existed, and the opportunity of making the objection earlier.

From this review of the cases, it appears that the rule laid down in *Hill vs. Yeates*, has not been strictly adhered to. Indeed, it is not easy to comprehend the propriety of the rule which admits that to be a mistrial, and remediable if discovered at any moment before verdict actually given, but which, if discovered immediately after, though it was impossible to ascertain it sooner, entitles the party to no remedy unless at the discretion of the Court, in view of the justice of the case.

No American authorities have been referred to bearing upon the point under consideration. There are several which show the necessity of distinguishing between such irregularities as may arise from the neglect or misconduct of officers or jurors, and those of a more serious nature, which deprive a party of his legal rights. Such a case is *The People vs. Ransom*, 7 Wend. 417—to which case our attention was directed by the District Attorney since the argument—in which Sutherland, J., takes occasion to review the doctrine of *Hill vs. Yeates*, and remarks: “I must confess that case carries the doctrine to an extent to which I should be unwilling to go. It appears to me to have been the verdict of but *eleven* men; the twelfth man was no juror, he was not on the panel; he was not the man intended to be summoned, nor was he even in fact summoned.” Also, “this case marks emphatically the strong reluctance of that Court to interfere with a verdict of a jury upon any objection of form not affecting the substantial merits of the case. With great deference and respect, however, I must say, that I think the Court, in that case, pushed the principle to a great extent.”

It thus appears that the doctrine, that an exception like the present, taken after verdict, can only be directed to the discretion of the Court, and is not a claim of right—is not fully sustained in

England, and is very strongly doubted here. Judge Bell, in the case of *Com. vs. Scallager*, 4 Pa. L. Jour. 511, mentions the introduction of one not summoned into the jury box as a cause for new trial. This, though but a *dictum*, shows that the doctrine in question is not generally admitted.

Upon the whole case, therefore, we feel bound to regard the prisoner as having, without any default or waiver on his part, been deprived of a right which the law gives to every man, which we, as its ministers, are bound to secure to him; that our duty does not depend upon our discretion, nor is it to be guided by our views of the justice of the case. The prisoner must have his legal rights, whatever we or others may think of his criminality, or however difficult it may be, if guilty, to bring him to justice. Entertaining these views, which seems to us the only safe ones in a case where liberty and life are at stake, we feel bound to grant the application for a new trial, and declare the rule absolute.

Supreme Court of Maine, 1852.¹

MOODY *vs.* BROWN.

1. The manufacture of an article, pursuant to the order of a customer, does not transfer the title.
2. Neither does the tender of the article, when so manufactured, transfer the title.
3. Neither does the leaving with the customer, against his will, of the article so manufactured and tendered, transfer the title.
4. To pass the title, there must be an acceptance, either express or implied.
5. An action against the customer, as for an article sold and delivered, cannot be maintained by the manufacturer, unless the article have been accepted.
6. An exception to this rule obtains, when the customer employs a superintendent, and pays for the property by instalments as the work progresses.

ON EXCEPTIONS from the District Court, HATHAWAY, J.

ASSUMPSIT, on a count for materials and labor furnished, and

¹ From 34 Maine Rep. 107, with the sheets of which we have been favored by Mr. Redington, the Reporter, in advance of publication.